provided that no such clause is "inconsistent with or a waiver of any of the conditions of the standard fire insurance policy." In the absence of such a co-insurance clause the terms of the standard policy secure to the insured payment of his entire loss up to the amount of the insurance. The pro rata clause of the standard fire policy provides that "This company shall not be liable for a greater proportion of any loss or damage than the amount hereby insured shall bear to the whole insurance covering the property, *whether valid or not and whether collectible or not.*" The plaintiff failed to carry insurance up to 80 per cent of the value of his property, and, in an action to recover for a loss, the defendant set up the co-insurance clause as a bar to full recovery. The plaintiff contended that this clause was inconsistent with the standard fire policy and void. *Held,* that the co-insurance clause was valid, since the pro rata clause was meant to include co-insurance, and since the legislature must be deemed to have considered this clause valid from its long continued use with the legislature's knowledge. Page, J., *dissenting. Aldrich v. Great Amer. Ins. Co.* (1921, App. Div.) 186 N. Y. Supp. 569.

The purpose of the standard fire policy laws was primarily to protect the insured against unusual and unnoticed conditions which would serve to defeat his well grounded expectations. *Quinlan v. Insurance Co.* (1892) 133 N. Y. 356, 31 N. E. 31; *Gazzam v. Insurance Co.* (1911) 155 N. C. 330, 71 S. E. 434; Vance, *Insurance* (1904) 432. Contracts of insurance made in any other form are wholly unenforceable as against the insured, but are enforceable as against the insurer. *Armstrong v. Insurance Co.* (1893) 95 Mich. 137, 54 N. W. 637; *Hicks v. Ass. Co.* (1900) 162 N. Y. 284, 56 N. E. 743. The rule of construction in favor of the insured applies to the standard policy as strictly as it formerly applied to the old forms. *Matthews v. Insurance Co.* (1897) 154 N. Y. 449, 456, 48 N. E. 751, 752; *Davis & Co. v. Insurance Co.* (1897) 115 Mich. 382, 73 N. W. 393. The co-insurance clause has been held inconsistent with the Kentucky valued policy laws and thus void. *Sachs v. Insurance Co.* (1902) 113 Ky. 88, 67 S. W. 23; *Hartford Ins. Co. v. Henderson Brewing Co.* (1916) 168 Ky. 715, 182 S. W. 852. In several states the co-insurance clause is expressly forbidden by statute. See Mo. Rev. St. 1909, sec. 7023; Wis. St. 1911, sec. 1943a; *Alsop Process Co. v. Insurance Co.* (1914) 175 Mo. App. 317, 162 S. W. 313. Some of these states forbid it except upon the express written request of the insured upon a form prescribed by statute. See Supp. Code Iowa 1913, sec. 1746; Mich. Comp. Laws 1915, secs. 9484-9489; *Att'y General v. Commissioner of Ins.* (1907) 148 Mich. 566, 112 N. W. 132. The court in the instant case concedes that "The co-insurance clause is a dangerous thing for a person who does not understand it . . . in the sense that he will not get what he thinks he is going to get." An examination of the clause and the labored explanation of the pro rata clause given in the opinion suggests that the average insured—if perchance he should read his policy—would not understand it. And the very purpose of the standard fire policy was to prevent such clauses from depriving the insured of "what he thinks he is going to get." The plain meaning of the pro rata clause would seem to forbid the interpretation placed upon it by the court. Nor is there any adequate reason why silence on the part of the legislature should be construed as giving consent to it. It is submitted, therefore, that the co-insurance clause should have been held invalid, a result reached in a recent case in the New York Supreme Court, which the instant case overrules. *Durham v. Insurance Co.* (1920, Sup. Ct.) 112 Misc. 440, 182 N. Y. Supp. 887.

INSURANCE—WARRANTY OF SEAWORTHINESS—WAIVER AND ESTOPPEL.—The insurance company's inspector reported to it that the ship in question was an undesirable risk. Later, the company issued a policy at a higher rate than usual, containing a warranty of seaworthiness. There was some evidence that at that

time a different report as to the ship's condition had been returned. *Held,* that a charge to the jury that the insurance company would be liable despite the warranty, if it knew the ship was unseaworthy and took the risk at a higher premium, should be upheld. *American Marine Ins. Co. v. Ford Corp.* (1920, C. C. A. 2d) 269 Fed. 768.

Warranties in insurance are in the nature of conditions precedent, in that upon strict compliance with them in every particular depend all rights of the insured in the policy. *Metropolitan Life Ins. Co. v. Rutherford* (1900) 98 Va. 195, 35 S. E. 361; *Ala. Gold Life Ins. Co. v. Johnston* (1887) 80 Ala. 467, 2 So. 125; but see *Chambers v. Northwestern Mutual Life Ins. Co.* (1896) 64 Minn. 495, 497, 67 N. W. 367, 368 (condition subsequent). By some courts, it has been held that if a warranty is not in fact complied with, the policy cannot be the foundation of any rights, regardless of the knowledge of the insurer of the actual condition of the risk at the time the insurance attached. *State Mutual Ins. Co. v. Arthur* (1858) 30 Pa. 315; *Franklin Fire Ins. Co. v. Martin* (1878) 40 N. J. L. 568. This result is reached through the view that as to a representation not true in fact the insurer's defense will be cut off, where by reason of his knowledge, there could be no misrepresentation; whereas with regard to a warranty, his defense is not fraud or misrepresentation, but failure to perform a condition precedent, as to which his knowledge or lack of knowledge of precedent facts is immaterial. In the final analysis, an affirmative warranty would seem to be nothing more than a representation conclusively made material by the terms of the contract. In regard to both representations and warranties relating to matters of opinion, the better view would seem to be to hold the insured merely to good faith, though few courts have been willing to apply the principle to warranties. *Supreme Lodge v. Dickson* (1899) 102 Tenn. 255, 52 S. W. 862; *Schwarzbach v. Protective Union* (1885) 25 W. Va. 622, 657. "Seaworthiness" is only a relative term depending on the particular service to be required of the ship. See 2 Arnould, *Marine Insurance* (9th ed. 1914) 873; Vance, *Insurance* (1904) 547. The term should not be construed in a way repugnant to the general purpose of the parties at the time the contract was executed. *Thebaud v. Great Western Insurance Co.* (1898) 155 N. Y. 516, 50 N. E. 284; *Farmer's Feed Co. v. Insurance Co.* (1908, C. C. A. 2d) 166 Fed. 111. By the weight of authority, if the company, through its agents, at the time the risk was to attach, knew of facts which, by reason of conditions inserted in the contract, would prevent it from ever attaching, and if the insured was misled by the acts of the company, it will be estopped to set up the breach of the condition. *Van Schoick v. Niagara Fire Ins. Co.* (1877) 68 N. Y. 434. There is undoubtedly a growing tendency to allow parol evidence to be introduced to set up a waiver or estoppel, and to admit frankly that in so doing an exception to the parol evidence rule is being established in favor of policy holders, because of the peculiar nature of such contracts. See *Welch v. Fire Ass'n of Phila.* (1904) 120 Wis. 456, 467, 98 N. W. 227, 230; *Spalding v. N. H. Ins. Co.* (1902) 71 N. H. 441, 444, 52 Atl. 858, 860; see (1920) 29 YALE LAW JOURNAL, 795. However, it is difficult to see how a true estoppel can be worked out in the instant case. A primary prerequisite for an estoppel is that the insured shall have been misled by the company. See Vance, *op. cit.,* sec. 124. There is nothing to show that the insured here did not intend to make the warranty a part of his obligation, or did not know it was written in the policy. Furthermore a warranty of seaworthiness is implied in fact in every contract of insurance on a ship. *Van Wickle v. Mechanics & Trader's Bank* (1884) 97 N. Y. 350; *Dixon v. Sadler* (1839, Exch.) 5 M. & W. 405, 414. Hence, it cannot be said he was misled by any act of the company, and the basis for an estoppel is lacking. Though the doctrine of the instant case would seem to be inconsistent with the present United States

Supreme Court rule, it may possibly be justified on the ground that the warranty was not as to a fact absolutely certain, but as to a matter of opinion, in which the insured should be held only to good faith.

PRACTICE—LAW OF THE CASE—MATTERS CONCLUDED BY A DECISION OF APPELLATE COURT.—The United States Supreme Court reversed a judgment for the plaintiff on the ground that, in rendering it, the Missouri court disregarded a judgment of a Connecticut Court which had held an insurance assessment valid. The Missouri court, upon reconsideration of the case, resolved that the Supreme Court had left untouched any consideration of the elements constituting the assessment and decided that a tax imposed by the laws of Missouri had been unlawfully included in the assessment, which was therefore void. The question was whether the state court proceeded in consonance with the decision of the Supreme Court. The defendant contended that the effect of the inclusion of the tax was presented to the Supreme Court, and that, by its decision, the state court was precluded from passing upon the validity of the inclusion of the tax in the assessment. *Held,* that the inclusion of the tax not having been discussed in the former decision, the state court was not precluded from passing on the question, as omissions do not constitute a part of a decision and become the law of the case. Holmes, Van Devanter, and McReynolds, J.J., *dissenting. Hartford Life Ins. Co. v. Blincoe* (1921) 41 Sup. Ct. 276.

When a question arising in the course of litigation has been determined by an appellate court, it cannot, after remand, be raised again and relitigated in the lower court. Black, *Law of Judicial Precedents* (1912) secs. 81, 83; 4 C. J. 1215; but see (1920) 29 YALE LAW JOURNAL, 568. The effect of a decision, as the law of the case, is restricted to propositions of law actually decided, and such points as are necessarily determined by the decision. *Parkin v. Grayson-Owen Co.* (1914) 25 Calif. App. 269, 143 Pac. 257. Where the judgment actually rendered could not have been given without deciding a particular question in a particular way, the decision of it is necessarily implied, although it was not expressly mentioned. *McKinney v. State* (1889) 117 Ind. 26, 19 N. E. 613. Some courts hold that, for a decision to be conclusive, the question involved must have been presented to the court as necessary to a decision in the case, and directly considered and decided, and that parties should not be concluded upon questions that are decided by mere implication arising from the general disposition of a case. *Gwin v. Waggoner* (1893) 116 Mo. 143, 22 S. W. 710. The principal case seems to hold that a decision is conclusive, as an adjudication, only as to those questions consciously before the court. This seems to be the better view, for it is often difficult to ascertain what is necessarily determined by a decision.

PROPERTY—FUTURE INTERESTS—RULE IN SHELLEY'S CASE—A conveyance was made to one Goode, "and after his death to the heirs of his body, their heirs and assigns forever." Goode, after birth of issue, sold to the defendants. The plaintiffs claimed as heirs of the body of Goode. *Held,* that Goode had but a life estate, the rule in Shelley's Case not applying, and that the plaintiffs should take as remaindermen. *Blythe v. Goode* (1920, C. C. A. 4th) 269 Fed. 544.

The rule in Shelley's Case applies where, after a life estate, a remainder is limited to the life-tenant's heirs, or to the heirs of his body, making such a remainder take effect by descent and giving an inheritable interest to the life tenant. But heirs or heirs of the body must be used technically to mean an indefinite succession of the life tenant's issue; and a preliminary question is always raised as to whether the words used mean such indefinite succession or designate particular persons at the death of the life tenant, who may now be the source of the line of descent. In *Archer's Case,* which started this trend of decisions, it was decided that a limitation to R. A. and after to the next heir